FILED
OCT 15 1997
CLERK

No. 97-448 (3)

IN THE

# Supreme Court of the United States

**October Term, 1997**

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ABDUL RASHID,

*Petitioner,*

*against*

MARINE MIDLAND BANK f/k/a
MARINE MIDLAND BANK, N.A.,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

## PETITIONER'S REPLY BRIEF

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THE REPORTER COMPANY, *Printers and Publishers, Inc.*
181 Delaware Street, Walton, NY 13856—800-252-7181
(3676 – 1997)

Printed on Recycled Paper

7 pp

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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# PETITIONER'S REPLY BRIEF

## I

Contrary to the assertion in respondent's Statement of the Case, the statements in petitioner's Statement of the Case are all based on facts clearly stated in the record or which can be reasonably inferred from facts in the record. The allegations made in the petition are based on the record and were presented to the courts below, including the New York Court of Appeals.

## II

Contrary to respondent's suggestion in its argument, petitioner was indeed prevented from obtaining evidence during discovery. When respondent's summary judgment motion was made discovery was outstanding and incomplete; this included demands for interrogatories and depositions. Pursuant to C.P.L.R. Rule 3214(b) disclosure was stayed when respondent moved for summary judgment. Counsel's affirmation in opposition to the motion for summary judgment stated that there was evidence in the files of respondent that would support petitioner's claims, and that petitioner was seeking discovery of that evidence.

While it is true that petitioner was represented by counsel, he was nevertheless coerced by respondent. The bank held hostage an overwhelming majority of petitioner's assets (his house, stock and the condominium project itself) which, as the record clearly shows, had been tendered as collateral pursuant to prior written agreements. The bank refused to release the house and stock when full payment was tendered for the bridge loan in accordance with the then current agreements and insisted on a new, modified loan agreement.

The bank, through excessive delays and other harmful conduct, tried to force petitioner into default and threatened to unilaterally liquidate the stock in its possession as collateral. Such liquidation would have created a large income tax liability for petitioner and, without access to any proceeds from such liquidation, petitioner would have been insolvent. The bank was fully aware of this as it had petitioner's personal financial statements.

The bank was in a position to make good on its threats. After almost a year of unsuccessful efforts by petitioner's counsel to have the bank abide by the existing agreement, petitioner was forced by the bank's coercive and fraudulent conduct to capitulate and sign the loan modification agreement.

With the bank in control of petitioner's assets, and refusing to abide by the existing agreement, petitioner had no option to terminate negotiations or obtain better terms without facing total financial ruin. The parties were not playing on a level playing field.

This is not a case like *Citibank, N.A. v. Plapinger,* 66 N.Y.2d 90, 495 N.Y.S.2d 309 (1985), cited by respondent. Here the economic and power disparity between the parties meant there were no negotiations between equals.

Contrary to respondent's assertion, the allegations made in support of petitioner's claims are provable and are not made inadmissible by the Parol Evidence Rule and the Statute of Frauds. The Parol Evidence Rule does not bar receiving evidence of fraudulent misrepresentation. *Sabo v. Delman,*3 N.Y.2d 155, 161, 164 N.Y.S.2d 714 (1957); *see, GTE Automatic Electric Inc. v. Martin's Inc.,* 127 A.D.2d 545, 546, 512 N.Y.S.2d 107 (1st Dept. 1987).

The allegations made by petitioner may be proved without violating N.Y. General Obligations Law § 15-301. *See, Maynard Court Owners Corp. v. Rentoulis,* __A.D.2d__, 652 N.Y.S.2d 664 (3d Dept. 1997); *Sarcona v. DeGiamo,* 226 A.D.2d 1143, 641 N.Y.S.2d 479 (4th Dept. 1996). At issue are the circumstances surrounding respondent's actions when the agreements between the parties were written and then revised, and its subsequent actions forcing petitioner into foreclosure.

Waiver, estoppel or partial performance are defenses to the statute of frauds. *See, Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 175, 415 N.Y.S.2d 663 (1982); *310 South Broadway Corp. v. Barrier Gas Service, Inc.*, 224 A.D.2d 409, 637 N.Y.S.2d 765 (2d Dept. 1996).

As stated in the petition, the constitutional issue presented by petitioner is properly before this court.

## CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted. In the event that the petition is granted, petitioner urges that the order of the Appellate Division, Second Department be reversed.

Dated: October 16, 1997

Respectfully submitted,

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